(4)

No. 91-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In this case, petitioner contends that the right to vote for the candidate of one's choice is a right guaranteed by the First and Fourteenth Amendments to the federal Constitution; that this fundamental right to vote entitles petitioner to utilize his franchise to express his dissatisfaction with the range of choices presented on the ballot and to vote, instead, by writing-in the names of his preferred candidate or candidates; and that Hawaii's blanket prohibition against write-in voting impermissibly burdens this fundamental right of petitioner where, as here, the total ban against write-in voting cannot be shown to be "necessary" or "narrowly tailored" to the advancement of any substantial governmental interests.

Respondents' Brief in Opposition seeks to sidestep the force of these claims by portraying this case as little more than a run-of-the-mill "ballot access" controversy. Respondents' strategic interest in characterizing the case in this fashion is transparently obvious. For, under this Court's jurisprudence respecting rights of electoral participation, the Court has often been quite deferential in its review of state laws that regulate access to the ballot by candidates and by political parties. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974). By contrast, this Court has typically imposed a more stringent level of judicial scrutiny upon laws that have been shown to abridge directly the fundamental right to vote, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965), or fundamental rights of political expression and association. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Properly understood, this is a case where Hawaii

policy directly burdens the right to vote and the rights of political expression and association. But, given the state of this Court's jurisprudence, one can well understand why respondents would seek to characterize this as a "ballot access" case where the burden on the right to vote is only indirect and where judicial deference to the state is far greater. Respondents' characterization of this case is ultimately misplaced. Nevertheless, the two dramatically different conceptions of this case adopted by petitioner and respondents mirror, to some degree, the differing conceptions adopted by the Fourth Circuit and the Ninth Circuit with respect to write-in voting. And, as indicated in the petition for *certiorari*, review should be granted by this Court to resolve the sharply conflicting conceptual approaches toward write-in voting embraced by the Fourth and Ninth Circuits.

Review should also be granted because the Ninth Circuit misconstrued and misapplied the standard set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Anderson* provides a flexible analytic standard that is broad enough to encompass the full panoply of cases involving the constitutional right of electoral participation -- cases that range from challenges to laws that directly burden the right to vote and the right of political expression to challenges that attack the manner in which a state regulates candidate access to the ballot. But, if *Anderson* is to be reconciled with cases like *Tashjian* and *Eu*, it must be seen as incorporating a standard of heightened scrutiny in circumstances where a statute or policy directly or substantially burdens fundamental rights. Accordingly, where, as here, Hawaii's policy directly burdens the fundamental right to vote as well as rights of political expression and association, the proper application of the *Anderson* standard requires that the state demonstrate a genuinely close fit between the law in question and the interests that the law purports to advance. The Ninth Circuit below demanded no such genuinely close fit. In this regard, the court below mis-

applied the *Anderson* standard. And for this reason, as well, *certiorari* should be granted by this Court.

These arguments in support of *certiorari* are amply set forth in the petition previously filed with the Court. No rehearsal of these arguments is necessary or appropriate here. Instead, this Reply Brief addresses two issues raised, for the first time, in respondents' Brief in Opposition.[1] Those issues are (1) whether the petition was untimely filed; and (2) whether petitioner lacks "prudential" standing in this case. Each of these issues will be addressed, in turn.

ARGUMENT

I. THE PETITION WAS TIMELY FILED

Rule 13.4 of the Supreme Court Rules provides, in part, that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of *certiorari* . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Thus, respondents' suggestion that "there is some doubt that the Petition is timely" (Brief in Opposition at 29) turns upon the claim that Burdick's petition for rehearing in the Ninth Circuit was not timely filed. But, in this respect, respondents are simply wrong. The petition for rehearing was timely filed in the court below.

Rule 40 of the Federal Rules of Appellate Procedure provides, in part, that "[a] petition for rehearing

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[1] Respondents raise a third issue not addressed in the petition. Respondents contend that petitioner waived his federal claims by failing to follow the procedures commended by this Court in *England v. Louisiana Board of Examiners*, 375 U.S. 411 (1964). Respondents' contention, in this regard, is utterly without merit. This contention was previously considered by the court below and properly rejected by the Ninth Circuit. (Appendix to Petition at 16a-17a).

may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." In this case, the time for Burdick to file a petition for rehearing with a suggestion for rehearing *en banc* was enlarged from 14 to 21 days by order of the Ninth Circuit, dated April 15, 1991. (*See* Appendix to Brief in Opposition at 1a-2a).[2] Burdick's petition for rehearing with a suggestion for rehearing *en banc* was filed in compliance with the court's order of April 15, 1991 and was, therefore, timely. Accordingly, the petition for a writ of *certiorari* filed in this Court within 90 days of the Ninth Circuit's June 28, 1991 denial of Burdick's petition for rehearing is timely.

Petitioner is reinforced in this conclusion by the very case cited by respondents in support of the suggestion that the instant petition is untimely. In *Bowman v. Loperena*, 311 U.S. 262, 266 (1941), this Court observed:

> The filing of an untimely petition for rehearing which is not entertained or considered on the merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time to appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof.

In this case, the court below extended, by court order, the time within which to file the petition for rehearing and after considering the merits denied the petition -- although not without also withdrawing the court's earlier opinion and entering a new opinion. Under these circumstances and upon the standards articulated by this Court in *Bowman v. Loperena*, the instant petition was timely filed.

II. PETITIONER DOES NOT LACK PRUDENTIAL STANDING TO SUE

Respondents contend that Burdick lacks "prudential" standing to pursue the claims that he advances here. In this regard, respondents assert that principles of "prudential" standing require "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (Brief in Opposition at 19). Respondents further maintain that, under this Court's election decisions, the Constitution only protects voters who seek to associate with "minor party or independent candidates" who are "frozen out" of the political process; and that, in this case, where petitioner has not identified any such candidate that he would seek to support, principles of "prudential" standing

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[2] The April 15, 1991 order of the Ninth Circuit, by its terms, granted Burdick's "motion for an extension of time to file a petition for rehearing *en banc* from 14 days to 21 days . . . ." While the order referred ambiguously and incorrectly to "a petition for rehearing *en banc*," it is clear that Burdick's motion to the Ninth Circuit was denominated as one "for an extension of time to file petition for rehearing with suggestion for rehearing *en banc*." (The motion without its supporting affidavit is appended to this Reply Brief as Appendix A.) It is also clear that the underlying petition submitted to the Ninth Circuit described itself as a "Petition for Rehearing With Suggestion For Rehearing *En Banc*." (The cover page from the Petition for Rehearing is reproduced as Appendix B to this Reply Brief.) And, finally, it is clear that the Ninth Circuit treated the petition as a petition for rehearing with a suggestion for rehearing *en banc*. In issuing its June 28, 1991 decision, the court expressly "denied" the petition for rehearing and "rejected" the suggestion for rehearing *en banc*. (*See* Order of the Court of Appeals set forth in the Appendix to Petition at 4a-5a). Thus, despite the ambiguity of the court's order of April 15, 1991, the "Court of Appeals interpreted and actually treated [Burdick's] papers as including a petition for rehearing before the panel." *See Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 1661 (1990).

are not satisfied. (Brief in Opposition at 19).

In fashioning this argument, respondents offer an extremely narrow and ultimately erroneous description of this Court's voting rights jurisprudence. This Court has entertained a great many constitutionally based cases involving rights of electoral participation that extend well beyond circumstances where minor party or independent candidates are being frozen out of the political process. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330; *Carrington v. Rash*, 380 U.S. 89; *Buckley v. Valeo*, 424 U.S. 1; *Tashjian*, 479 U.S. 208; *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214. Respondents' argument represents simply another effort to mischaracterize this controversy as a "ballot access" case and to ignore Burdick's claim that the constitutional right to vote entitles him to use the franchise to express his dissatisfaction with the candidates presented on the ballot.

Moreover, in fashioning this argument respondents also ignore one of the precipitating factors giving rise to this lawsuit. In the 1986 complaint filed in this case, Burdick asserted that, as of July 23, 1986 (the deadline for candidates to file nominating papers in that election year), only one candidate had filed to run for election to the State House of Representatives in the district in which Burdick lived; that Burdick had no desire to vote for that candidate; that, as the sole candidate who had filed for election in Burdick's state legislative district, this candidate would be deemed to be "automatically" elected to office under Hawaii law; that Burdick was, therefore, left without a candidate to vote for with respect to that state legislative race; and that Burdick wanted to complete a write-in ballot to vote against this candidate who was running unopposed. (Complaint, ¶7, set forth in Appellant's Excerpts of Record filed in the Ninth Circuit at 257).

These assertions make clear that, while Burdick did not identify any specific candidate for whom he would

wish to vote, he did identify a particular candidate against whom he wished to vote. Moreover, these assertions demonstrate the nature of the concrete injury sustained by petitioner as a result of Hawaii's prohibition against write-in voting. The 1986 state legislative election left Burdick with two unpalatable choices: he could either vote for the sole candidate appearing on the ballot or he could choose not to vote at all. Petitioner asserts that the First and Fourteenth Amendment to the federal Constitution guarantees him another choice: the right to vote against the only candidate appearing on the ballot in Burdick's state legislative district.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the previously filed petition, the petition for *certiorari* should be granted.

Respectfully submitted,

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Dated: November 25, 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	C.A. NOS. 90-15873
	)	90-15876
Plaintiff-Appellee,	)	90-15877
	)	
v.	)	D.C. NOS.
	)	CV-86-0582-HMF
MORRIS TAKUSHI, Director	)	CV-86-0365-HMF
of Elections, State of Hawaii;	)	
JOHN WAIHEE, Lieutenant	)	ON APPEAL FROM
Governor, State of Hawaii;	)	THE ORDER AND
BENJAMIN CAYETANO,	)	JUDGMENT OF THE
in his capacity as Lieutenant	)	DISTRICT COURT
Governor of the State of	)	FOR THE DISTRICT
Hawaii; MORRIS TAKUSHI,	)	OF HAWAII, CHIEF
Director of Elections	)	UNITED STATES
of the State of Hawaii,	)	DISTRICT JUDGE
	)	HAROLD M. FONG
Defendants-Appellants.	)	PRESIDING
	)	

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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PLAINTIFF-APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING WITH SUGGESTION WITH REHEARING EN BANC

Plaintiff-Appellee Alan Burdick through his counsel undersigned, hereby moves this Court for an Order Extending the Time within which Plaintiff-Appellee may file his Petition for Rehearing with Suggestion for Rehearing En Banc, of the Court's decision entered herein on March 1, 1991 from 14 days to 21 days.

This Motion is made pursuant to Federal Rules of Appellate Procedures 26, 27, and 40 and Ninth Circuit Rule 27-1 and is based on the Affidavit of Counsel attached hereto.

Dated: Wailuku, Maui, Hawaii, March 21, 1991

/s/
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Attorney for Plaintiff-Appellee,
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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	C.A. NOS. 90-15873
	)	90-15876
Plaintiff-Appellee,	)	90-15877
	)	
v.	)	D.C. NOS.
	)	CV-86-0582-HMF
MORRIS TAKUSHI, Director	)	CV-86-0365-HMF
of Elections, State of Hawaii;	)	
JOHN WAIHEE, Lieutenant	)	ON APPEAL FROM
Governor, State of Hawaii;	)	THE ORDER AND
BENJAMIN CAYETANO,	)	JUDGMENT OF THE
in his capacity as Lieutenant	)	DISTRICT COURT
Governor of the State of	)	FOR THE DISTRICT
Hawaii; MORRIS TAKUSHI,	)	OF HAWAII, CHIEF
Director of Elections	)	UNITED STATES
of the State of Hawaii,	)	DISTRICT JUDGE
	)	HAROLD M. FONG
Defendants-Appellants.	)	PRESIDING
	)	

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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